IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 8TH JUNE 2007 / 18TH JYAISHTA 1929

SA.No. 25 of 1993()

AGAINST THE JUDGMENT AND DECREE DT.13.7.1992 IN AS.98/1988 of PRINCIPAL SUB COURT,PARAVUR.
O.S. NO,.154/1980 OF THE MUNSIFF COURT, PERUMBAVOOR.

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APPELLANT: APPELLANT/ PLAINTIFF

RAHEL, D/O. YOYAKKI, THAZATHE POIKKATTIL VEETTIL, PUZHAKKATTU KARA, BENGOOR WEST VILLAGE, KUNNATHUNADU TALUK.

BY ADV. SRI.S.EASWARAN

RESPONDENTS: RESPONDENTS / DEFENDANTS

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1. **GHEEVARGHESE MATHAI, MATTUMANA, RESIDING AT ARTHINGAL, PUZHAKKATTU KARA, VENGOOR WEST VILLAGE, KUNNATHUNADU TALUK.**

2. **GHEEVARGHESE CHERIYAN, MATTUMANA, RESIDING AT ARTHINGAL, PUZHAKKATTU KARA, VENGOOR WEST VILLAGE, KUNNATHUNADU TALUK.**

3. **ACHI, W/O.GHEEVARGHESE, DO. DO.**

4. **SARAMMA, W/O. AVARACHAN OF PUTHUSSERI DO. DO.**

5. **ANNAMMA ALIAS ANNAKUNJU, W/O. IYPE ALIAS BABY OF KOCHUKUDIYIL KOTATHIKARA, MOOVATTUPUZHA VILLAGE.**

* 6. **MATHAI ISHAK, CHELATIYA MANACHERI RESIDING AT POIKKATTIL VEETTIL, PUZHAKKATTU KARA , VENGOOR WEST VILLAGE, KUNNATHUNADU TALUK (DIED)**

ADDL.R7 TO R9 ARE IMPLEADED.

7. **ISSAC MATHEW, S/O. LATE MATHAI ISHAK, MANACHERI HOUSE, THURUTHI P.O. VIA KURUPPUMPADI, PERUMBAVOOR.**

**8. M.I.YOYAK, SON OF LATE MATHAI ISHAK,
RESIDING AT POIKKATTIL VEETTIL, PUZHAKKATTU KARA ,
VENGOOR WEST VILLAGE, KUNNATHUNADU TALUK.**

9. M.I.GEORGE, S/O. LATE MATHAI, ISHAK, DO. DO.

*** ADDL.RESPONDENTS R7 TO R9 ARE IMPLEADED AS THE LRS OF DECEASED 6TH RESPONDENT AS PER ORDER DT. 25.5.07 IN I.A. 1174/06.**

**BY ADV. SRI.T.P.MATHAI R1 & R2
SRI.P.V.BABY.R6.**

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 08/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

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S.A.No. 25 OF 1993

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DATED THIS THE 8TH DAY OF JUNE, 2007

JUDGMENT

Plaintiff in O.S.154/1980 on the file of Munsiff Court, Perumbavoor is the appellant. Defendants are the respondents. The suit was instituted seeking a decree for permanent prohibitory injunction in respect of 32 cents in R.S.No.636/23 of Vengoor West Village. Appellant in the plaint contended that plaint schedule property, along with other items belonged to Naramangalath Mana and was mortgaged to Paily and his brother Mathulla as per mortgage deed 2034 of 1065 ME and after the death of the mortgagees, their right devolved on Yoyakki son of Paily and Mathu, grandson of Mathulla. Meanwhile under Ext.B2 dated 11.6.1110 Mana transferred their right of equity of redemption to Annam wife of Mathu. The right of Mathu over the plaint schedule property was thereafter released in favour of Yoyakki. Appellant is the daughter of Yoyakki. The properties of Yoyakki are lying adjacent to the plaint schedule property and Yoyakki and his family were residing in that house. At the time of marriage of appellant with sixth respondent, Yoyakki executed a settlement deed

700/1109 ME as Sthreedhanam, reserving some right to third defendant and all the persons who got right over the properties including Yoyakki executed assignment deed 1183/1114 ME in favour of the appellant and sixth respondent. But the plaint schedule property was not included in that document though the property was given in possession as dowry to the appellant. According to appellant as the property was mortgaged it was not included in the settlement deed. Yoyakki died in 1118 ME and the mother Kunjilachi died in 1128 ME. It was claimed that thus appellant and sixth respondent became the absolute owners of one acre eleven cents and the plaint schedule property and the right of equity of redemption was purchased by sixth respondent and Cheriya Geevarghese, the husband of third respondent as per Ext.B1 document No.2752/1956 and though they were prepared to pay the mortgage amount due to Mathu to Annam but she refused to receive the same and therefore sixth respondent and third respondent jointly filed O.S.24/1960 before Munsiff Court, Perumbavoor for redemption of the mortgage and Mathu Annam was the first defendant therein and suit was decreed and the appeal preferred against the decree and judgment was dismissed and during the pendency of the

proceedings, husband of the third respondent died and in execution of the proceedings, decree holders took delivery of possession of item Nos 2 and 3 in that suit but first respondent did not obtain actual delivery of the plaint schedule property and first respondent has succeeded in creating documents to the effect that he obtained delivery of possession but it was only a symbolic delivery and in such circumstances, respondents are not in possession of the property and appellant is entitled to the decree for permanent prohibitory injunction.

2. Respondents 1, 2 4 and 5 are the children of 3rd respondent. They contended that plaint schedule property is not lying contiguous to the property of the appellant and plaint schedule property was not given in possession to the appellant by her father and plaint schedule property was not included in the settlement deed 1183/1114 and the jenmom right of the property was purchased by the respondents as per document No.2742/1957 and thereafter Geevarghese, father of the respondents 1, 2, 4 or 5 and husband of 3rd respondent along with sixth respondent filed O.S.24/1960 before Munsiff Court, Perumbavoor and a decree for redemption and possession was granted and the plaint schedule property was taken delivery of in

execution of the decree. It was admitted that only symbolic delivery was effected in execution of the decree and as the appellant did not obtain possession of the property she is not entitled to the decree for injunction sought for. Sixth respondent in his separate written statement contended that plaint schedule property was put in possession of the appellant towards her Sthreedhanam, though property was not included in document 1183/1114 ME and 6th respondent believed that B schedule property to the lease deed 1182/1114 was acquired by the husband of the third respondent and he was unaware of the fact that plaint schedule property was included in the lease deed at the time of filing O.S.24/1960 and that suit was later decreed and the plaint schedule property is in the possession of the appellant and sixth respondent filed O.S.1116/1980 a suit for partition which is pending and therefore appellant is entitled to the decree sought for.

3. Learned Munsiff framed the necessary issues. On the evidence of Pws 1 to 6, Dws 1 and 2 and Exts.A1 to A3 and B1 to B11 and C1 and C1(a), learned Munsiff found that appellant did not establish her possession of the property and therefore she is not entitled to the decree sought for. Appellant challenged the

decree and judgment before Sub Court, North Paravur in A.S.98 of 1988. Learned Sub Judge, on reappreciation of evidence, confirmed the findings of learned Munsiff and dismissed the suit. It is challenged in the second appeal.

4. The second appeal was admitted formulating the following substantial questions of law.

1)Whether first appellate court was correct in deciding the question of title when an issue on title was not framed in the suit and the suit was only one for injunction

2)Whether the courts below erred in deciding the question of possession against the appellant and on the evidence whether appellant is entitled to the decree for injunction

5. There was no representation for the respondents when the appeal was heard.

6. The learned counsel appearing for the appellant was heard. The learned counsel argued that though there was no issue on the question of title and issue regarding possession alone was framed by the trial court, first appellate court should not have entered a finding on the title and to that extent the judgment of the first appellate court is unsustainable. It was also argued that courts below failed to take note of the

importance of Ext.A3 judgment in O.S.116/1980 whereunder possession of the plaint schedule property with the appellant was affirmed by the court and also the report and plan submitted by the Commissioner and in such circumstances courts below should have granted a decree for injunction as sought for.

7. The only issue framed by the trial court was on the question of possession. Title was not an issue. Court fee was paid only under Section 27(c) of Kerala Court Fee and Suit Valuation Act and not under Section 27(a). In such circumstances when the trial court did not enter a finding on the question of title, first appellate court was not called upon to enter a finding. Unfortunately, first appellate court, after discussing the evidence, observed that plaintiff is not having a title or possession over the plaint schedule property. The observation on the question of title in the circumstances of the case was uncalled for and therefore has to be set aside.

8. The question is whether findings of the courts below on the question of possession against appellant warrants any interference. At the outset, it is to be pointed out that plaint does not disclose when exactly appellant obtained possession of the plaint schedule property except an allegation that as per the

settlement deed, as dowry plaint schedule property was put in possession of the appellant and sixth respondent her husband. At the same time, it was admitted that the settlement deed does not include the plaint schedule property. What was contended by appellant in the plaint was that plaint schedule property originally belonged in jenmom to Naramangalath Mana and they created mortgage 2034/1065 in favour of paily and his brother Mathu and subsequently the right of equity of redemption was purchased by the sixth respondent and Geevarghese, husband of third respondent. It was contended that the rights of the mortgagees on the death devolved on Yoyakki the father of the appellant and Mathu and the rights of Mathu was released in favour of Yoyakki and subsequently after getting the right of equity of redemption, on the refusal of the mortgage to Mathu Anna to receive the mortgage amount and surrender possession of the property O.S.24/1960 was filed by sixth respondent and the husband of the third respondent and a decree for redemption was passed. It was also admitted that in execution of the decree third respondent obtained delivery of the property, though it was contended that actual possession of the property was not obtained and only symbolic delivery was taken. Courts below

appreciating the evidence found that there is no evidence to prove that appellant obtained possession of the property. If the property was in possession of the mortgagee, Mathu Anna and a decree for redemption was passed, unless the delivery was taken from the mortgagee, appellant cannot claim possession of the property. Even though it was contended that father handed over possession of the plaint schedule property as dowry as per the settlement deed that settlement deed was also not produced. Settlement deed admittedly do not take in the plaint schedule property. In such circumstances, I find no reason to interfere with the factual findings of the courts below that appellant did not establish possession of the plaint schedule property. In such circumstances findings of courts below that appellant is not entitled to the decree for permanent prohibitory injunction does not warrant any interference.

9. The second appeal is allowed in part. The dismissal of the suit by the trial court and first appellate court is confirmed. But the finding on title by the first appellate court in A.S.98/1988 alone is vacated.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-

M.SASIDHARAN NAMBIAR, J

S.A.NO.25/1993

JUDGMENT

8th JUNE, 2007